Chan Hock Liong v Associated Motor Industries (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA — CIVIL APPEAL NO W–02–926 OF 1999
ZULKEFLI, LOW HOP BING AND ZAINUN ALI JJCA
29 AUGUST 2007

Labour Law — Employment — Reinstatement — Compliance with Industrial Court award — Industrial Relations Act ss 20 & 56

Labour Law — Employment — Reinstatement — What constituted equity, good conscience and social justice

The appellant was employed by the respondent company. The appellant was dismissed by the respondent. Pursuant to representations made under s 20 of the Industrial Relations Act 1967, the appellant's dismissal was referred to the Industrial Court. By Award No 322 of 1993, the Industrial Court held the dismissal was without just cause and ordered the appellant's reinstatement in addition to backwages of 24 months. The backwages were paid by the respondent. The respondent issued a letter to the appellant reinstating him to his former position and required him to report for duty. The appellant informed the respondent that he would not be reporting for duty at all. Instead, he treated himself as constructively dismissed. The appellant lodged an application to the Industrial Court under s 56 for non-compliance with the order for reinstatement. The Industrial Court handed down an award holding that the respondent had failed to comply with the order for reinstatement and ordered them to do so. The respondent commenced proceedings in the High Court to quash the said award. The High Court allowed the respondent's application and quashed the award. The appellant appealed to the Court of Appeal.

Held, dismissing the appeal:

(1) As a general rule, where an award of the Industrial Court revolves around an exclusive finding of fact based on credibility of witnesses, the High Court in the exercise of its judicial review jurisdiction is not inclined to interfere with such finding. However, where there is a question of mixed law and fact, the superior courts cannot simply fold their arms nor adopt a non-interference approach (see paras 25–26).

(2) The employee had chosen not to be reinstated as he had continued his employment with Car Seats (M) Sdn Bhd. The practical effect of the employee's choice is that he had wanted the best of both worlds ie to be gainfully employed by Car Seats (M) Sdn Bhd and still to be treated as constructively dismissed, so as to obtain enormous compensation against the employer (see paras 27–28).

(3) In the employer's reinstatement exercise, the employer's request to the employee to produce the written confirmation is consistent with para (iv) of the contract of service. There can be no dispute that the employer has indeed complied with the Industrial Court's order for reinstatement. The Third Award clearly runs counter to fundamental jurisprudence in industrial law which espouses the doctrine of equity, good conscience and substantial merits of the case (see para 29).

(4) Of singular significance is the principle that the Act is designed to ensure social justice to both employers and employees. Social justice is not to be administered as a monopoly of the employee to the exclusion of the employer. Social justice is to be meted out in favour of the employee just as much as it is to be done for the employer (see para 32.)

[Bahasa Malaysia summary

Perayu telah diambil bekerja oleh syarikat responden. Perayu telah dipecat oleh responden. Menurut representasi yang dibuat di bawah s 20 Akta Perhubungan Awam 1967, pemecatan perayu telah dirujuk ke Mahkamah Perusahaan. Melalui Award No 322 tahun 1993, Mahkamah Perusahaan telah memutuskan pemecatan itu adalah tanpa sebab yang adil dan memerintahkan perayu dikembalikan kepada jawatan asalnya dan dibayar gaji tertunggak selama 24 bulan. Gaji tertunggak itu telah dibayar oleh responden. Responden telah mengeluarkan sepucuk surat kepada perayu mengembalikannya kepada jawatan asalnya dan menghendakinya melaporkan diri untuk bertugas. Perayu telah memaklumkan kepada responden bahawa beliau tidak langsung akan melaporkan diri untuk bertugas. Sebaliknya, beliau menganggap dirinya telah dipecat secara konstruktif. Perayu telah mengemukakan satu permohonan ke Mahkamah Perusahaan di bawah s 56 untuk ketidakpatuhan perintah pengembalian jawatan. Mahkamah Perusahaan telah memberikan award memutuskan bahawa responden telah gagal untuk mematuhi perintah pengembalian jawatan itu dan memerintahkan mereka berbuat sedemikian. Responden telah memulakan prosiding di Mahkamah Tinggi untuk membatalkan award tersebut. Mahkamah Tinggi telah membenarkan permohonan responden dan membatalkan award itu. Perayu telah merayu ke Mahkamah Rayuan ini.

Diputuskan, menolak rayuan tersebut:

(1) Sebagai rukun am, di man satu award Mahkamah Perusahaan berkisarkan penemuan fakta eksklusif berdasarkan kebolehpercayaan saksi-saksi, Mahkamah Tinggi dalam menggunakan bidang kuasa semakan kehakimannya tidak boleh campur tangan dengan penemuan sedemikian. Namun, jika terdapat campuran persoalan undang-undang dan fakta, mahkamah tertinggi tidak boleh berdiam diri atau menggunakan pendekatan tidak campur tangan (lihat perenggan 25–26).

(2) Pekerja itu telah memilih untuk tidak dikembalikan jawatannya kerana beliau telah bekerja dengan Car Seats (M) Sdn Bhd. Kesan praktikal pilihan pekerja adalah bahawa beliau inginkan yang terbaik daripada dua pihak iaitu diambil

bekerja oleh Car Seats (M) Sdn Bhd dan masih dianggap telah dipecat secara konstruktif, agar dapat memperoleh pampasan lumayan daripada majikannya (lihat perenggan 27–28).

(3) Dalam amalan pengembalian jawatan oleh majikan, permintaan majikan kepada pekerja untuk mengemukakan pengesahan bertulis adalah konsisten dengan perenggan (iv) kepada kontrak perkhidmatan. Tidak dipertikaikan bahawa majikan sememangnya telah mematuhi perintah pengembalian jawatan Mahkamah Persekutuan. Award ketiga jelas bertentangan dengan jurisprudens penting dalam undang-undang perindustrian yang menyokong doktrin ekuiti, firasat baik dan merit substantif kes (lihat perenggan 29).

(4) Satu-satunya yang penting adalah prinsip bahawa Akta tersebut telah digubal untuk memastikan keadilan sosial kepada kedua-dua majikan dan pekerja. Keadilan social ini tidak patut ditadbirkan sebagai satu monopoli majikan yang mengenepikan pekerja. Keadilan kehakiman hendaklah dilaksanakan menyebelahi majikan dan begitu juga patut dilaksanakan untuk pekerja (lihat perenggan 32).]

Notes

For cases on reinstatement, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1072–1079.

Cases referred to

Dragon & Phoenix Bhd v Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pualu Pinang & Anor [1991]) 1 MLJ 89 (refd)

Holiday Inn Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers [1988] 1 MLJ 306 (refd)

Hodge v Ultra Electric Ltd [1943] 1 KB 462 (refd)

Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd & Anor [2004] 1 MLJ 512 (refd)

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600 (refd)

Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia [2004] 4 CLJ 657 (refd)

Thilagavathy a/p Alagan Muthiah v Meng Sing Glass Sdn Bhd & Anor [1997] 3 MLJ 735 (refd)

V Subramaniam & Ors v Craigielea Estate [1982] 1 MLJ 317 (refd)

William Dixon Ltd v Patterson (1943) SC (j) 78 (refd)

William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20, 30(5), 33(1), 33B, 56

Appeal from: Originating Motion No R2–25–98 of 1998 (High Court, Kuala Lumpur)

B Lobo (Lobo & Associates) for the appellant.
N Sivabalah (Shearn Delamore & Co) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] On 3 November 1999, the learned judge of the Kuala Lumpur High Court allowed the notice of motion of the respondent – employer ('the employer') and issued an order of certiorari which quashed Industrial Court Award No 379 of 1998 dated 27 July 1998 ('the third award'). The appellant — employee ('the employee') has lodged this appeal against the High Court decision.

FACTUAL BACKGROUND

[2] The employee was dismissed by the employer on 8 August 1988. Pursuant to representations made under s 20 of the Industrial Relations Act 1967, the employee's dismissal was referred to the Industrial Court. The Industrial Court vide Award No 322 of 1993 ('the First Award') held that the dismissal was without just cause or excuse and ordered the employee's reinstatement, in addition to back wages of 24 months ('the back wages').

[3] For brevity and convenience, a reference to a section hereinafter is a reference to that section in the Industrial Relations Act 1967 unless otherwise stated.

[4] The employer vide letter dated 3 November 1993 reinstated the employee to his former position and required the employee to report for duty on 16 November 1993.

[5] The employer's letter also requested the employee to give his written confirmation that he was no longer in the employment of his then employer, Car Seats (M) Sdn. Bhd. ('the written confirmation'), failing which the employer would be at liberty to treat the reinstatement as void. This request is consistent with the express term contained in para (iv) of the employee's contract of service with the employer ie upon the continuance of the employee's employment with the employer, the employee was not to engage directly or indirectly in any other business or occupation ('para (iv) of the contract of service').

[6] The employee vide letter dated 17 November 1993 informed the employer that he would not be reporting for duty at all.

[7] In response thereto, the employer vide letter dated 19 November 1993 expressed regrets that the employee had decided not to report for duty.

[8] The employee continued to remain in the employment of Car Seats (M) Sdn Bhd.

[9] The employee subsequently lodged two applications in the Industrial Court against the employer viz:

(a) under s 56, for non-compliance with the orders for reinstatement and back wages in the first award handed down by the Industrial Court ('application (a)'); and

(b) under s 33, seeking a variation of the first award ('application (b)').

[10] The Industrial Court handed down an award ('the second award') dismissing application (b). The second award was subsequently affirmed by the High Court as well as the Court of Appeal.

[11] In relation to application (a), the Industrial Court handed down the third award and held that the employer had failed to comply with the order for reinstatement. The Industrial Court also ordered the employer to reinstate the employee on 17 August 1998. The employer then reinstated the employee and requested the employee to produce the written confirmation. The employee again refused to do so and had never reported to the employer for duty at all. Instead, he had treated himself as constructively dismissed. Meanwhile, he remained as an employee of Car Seats (M) Sdn Bhd.

[12] The employer subsequently commenced proceedings for an order of certiorari in the High Court to quash the third award. The High Court allowed the employer's application for certiorari and quashed the third award. Against the High Court decision, the employee filed the instant appeal to this court.

[13] As the employer has paid the back wages to the employee, this appeal is confined to the issue of reinstatement only.

REINSTATEMENT

[14] Employee's learned counsel Mr B Lobo submitted that the Industrial Court had handed down the third award pertaining to reinstatement as a finding of fact which is sheltered by s 33B, and so the learned judge of the High Court had erroneously interfered with the third award by quashing it. Support was sought in:

(i) *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1 (CA);

(ii) *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 (CA);

(iii) *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd & Anor* [2004] 1 MLJ 512 (CA); and

(iv) *Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia* [2004] 4 CLJ 657 (FC).

[15] Learned counsel Mr N Sivabalah contended for the employer that the High Court had correctly held that the employer had complied with the order for reinstatement. He relied inter alia on:

(i) *Holiday Inn Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 (SC); and

(ii) *Dragon & Phoenix Bhd v Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pualu Pinang & Anor* [1991] 1 MLJ 89 (SC).

[16] Having regard to the above factual background, I am of the view that in this appeal, the question for determination may be formulated as follows:

> Did the High Court judge err in holding that the employer had complied with the order for reinstatement and in setting aside the third award of the Industrial Court?

[17] Since the third award was handed down pursuant to application (a) under s 56, this section, where relevant, merits reproduction as follows:

> 56. Non-compliance with award...
>
> (1) Any complaint that any term of any award... which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any... person bound by such award.
>
> (2) The Court may, upon receipt of the complaint — (a) make an order directing any party —
>
> (i) to comply with any term of the award...; or
>
> (ii) to cease or desist from doing any act in contravention of any term of the award …

[18] As will be seen later in this judgment, the question of interpreting an award under s 33 is also relevant and significant. Hence, s 33, where applicable, merits reproduction as follows:

> 33. Interpretation … of awards...
>
> (1) If any question arises as to the interpretation of any award … taken cognizance of by the Court, any party bound by the award ….may apply to the Court for a decision on the question.
>
> (2) The Court may, upon the application of any party, by order vary any of the terms of an award... if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.

[19] Sectionns. 56 and 33(1) were judicially considered by the Federal Court in *Tanjong Jara Beach Hotel*, in which the question ventilated for determination by the Federal Court was whether the Industrial Court had the jurisdiction to exercise its interpretative power under s 33(1) in non-compliance proceedings brought under s 56 ('the question').

[20] Steve Shim CJ (Sabah and Sarawak) (as he then was) delivering the judgment of the Federal Court, answered the question in the affirmative. His Lordship held that there may be cases in which interpretation of an award is a sine qua non to ascertain whether there has been non-compliance with the same (see p 669c–d). In giving the answer, the Federal Court also considered the issue of whether the Industrial Court's interpretation disclosed an error of law.

[21] In the instant appeal, I shall apply the above principle and approach set out by the Federal Court. For this purpose, it is necessary for me to put in place the meaning of the word 'reinstatement'.

[22] 'Reinstatement' involves putting the specified person, in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his employment: per Tucker J in *Hodge v Ultra Electric Ltd* [1943] 1 KB 462 at p 466.

[23] To 'reinstate' as applied to a man who has been dismissed (ex hypothesi without justification) is to replace him in the position from which he was dismissed and so to restore the status quo ante the dismissal: per the Lord Justice-Clerk (Lord Cooper) in *William Dixon Ltd v Patterson* (1943) SC (j) 78 at p 85.

[24] It is abundantly clear to me that the determination of the issue of reinstatement revolves around a question of mixed law and fact. It is not merely a question of an exclusive finding of fact.

[25] As a general rule, where an award of the Industrial Court revolves around an exclusive finding of fact based on credibility of witnesses, the High Court in the exercise of its judicial review jurisdiction is not inclined to interfere with such finding: see eg s 33B, *William Jacks & Co*, *Quah Swee Khoon* and *Ngeow Voon Yean*.

[26] However, where there is a question of mixed law and fact, as in the issue of reinstatement before the High Court and now in the instant appeal, our superior courts cannot simply fold their arms nor adopt a non-interference approach.

[27] Reverting to the mainstream of the factual background, it needs to be observed that the employee had chosen not to be reinstated as he had continued his employment with Car Seats (M) Sdn Bhd. Consequently he was unable to produce the written confirmation.

[28] The practical effect of the employee's choice is that he had wanted the best of both worlds ie to be gainfully employed by Car Seats (M) Sdn Bhd and still to be treated as constructively dismissed, so as to obtain enormous compensation against the employer.

[29] In the employer's reinstatement exercise, the employer's request to the employee to produce the written confirmation is consistent with para (iv) of the contract of service. There can be no dispute that the employer has indeed complied with the Industrial Court's order for reinstatement. The third award clearly runs counter to fundamental jurisprudence in industrial law which espouses the doctrine of equity, good conscience and substantial merits of the case.

[30] This fundamental jurisprudence in industrial law has been given statutory expression in s 30(5), pursuant to which the Industrial Court shall act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form.

[31] In *Tanjong Jara Beach Hotel* at p 627b–d, the learned CJ (Sabah and Sarawak) said:

> In applying the powers under s.30(5) above, the Industrial Court has to bear in mind the underlying objective and purposes of the Act itself ie, that it is a piece of legislation designed to ensure social justice to both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimization by employers and to ensure termination of industrial disputes in a peaceful manner. Clearly therefore, the raison d'etre of the Industrial Court is to endeavour to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and labour and fostering good relationship.

[32] Of singular significance is the principle that the Act is designed to ensure social justice to both employers and employees. In my view, social justice is not to be administered as a monopoly of the employee to the exclusion of the employer. Social justice is to be meted out in favour of the employee just as much as it is to be done for the employer.

[33] The employer's request for the written confirmation is not out of the ordinary. It is indeed part and parcel of and is in complete consonance with para (iv) of the contract of service.

[34] There is no dispute whatsoever that the employer has made every effort to comply with the order for reinstatement. The employer's request for the written confirmation is obviously not an obstacle to the creation of harmony and cordial relationship between the employer and the employee. It does not constitute unfair labour practice. It cannot be construed as victimization of the employee by the employer. Being in consonance with para (iv) of the contract of service, there can be no doubt that it is a fair and just solution in the process of complying with the order for reinstatement.

[35] The employee's continued employment with Car Seats (M) Sdn Bhd, his refusal to give the written confirmation, his failure to report to the employer for duty and finally his decision to treat his unilateral conduct as constructive dismissal by the employer, can hardly be construed as equitable or in accordance with good conscience.

[36] On the other hand, the steps taken by the employer are consistent with substantial merits of the case. As the employer has made every effort to effect reinstatement of the employee, it is incumbent on the employee to honour his contractual obligations contained in para (iv) of the contract of service. However, the employee was oblivious to his contractual obligations.

[37] In the exercise of its interpretative power under s 33(1) in non-compliance proceedings brought under s56 in application (a), and in handing down the third award, the Industrial Court ought to have acted according to equity, good conscience and substantial merits of the case, as it is mandatory under s 30(5). In my view,

in handing down the third award, the Industrial Court has failed to do so. It has therefore occasioned an error of law which is amenable to judicial review by way of certiorari. Hence, the learned judge of the High Court was correct in issuing the order for certiorari: see eg *Holiday Inn Kuala Lumpur* and *Dragon Phoenix Bhd*.

SEVERABILITY AND SEVERANCE

[38] It was argued for the employee that:

(i) the orders for reinstatement and payment of back wages in the third award were not severable and that the severance thereof by the High Court has resulted in the third award being unworkable; and

(ii) as the employer had already paid the back wages, the order for reinstatement should have been affirmed by the High Court.

[39] The employer's response is that the High Court had quashed the third award relating to reinstatement only and the issue of back wages is separate and distinct. Support was sought in:

(i) *Thilagavathy a/p Alagan Muthiah v Meng Sing Glass Sdn Bhd & Anor* [1997] 3 MLJ 735 (HC); and

(ii) *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317 (FC).

[40] I am unable to agree with the submission presented for the employee. Back wages had never been an issue at all in the instant appeal as the employee had already received full payment therefor. There is no question of severability and severance of the third award, as the only issue in the instant appeal pertains exclusively to reinstatement.

[41] Be that as it may, for the sake of completeness, even assuming for a moment that there was severance by the High Court of the third award, such severance is indeed supported by authorities.

[42] In *Thilagavathy a/p Alagan Muthiah* at p 741, Abdul Kadir Sulaiman J (later FCJ) held inter alia that the issue of back wages was a separate matter altogether from the award of compensation in lieu of reinstatement.

[43] Further, in *V Subramaniam & Ors*, the Industrial Court, in ordering the reinstatement of the four employees, did not order that they be reinstated in their former position as trainees or on probation, but as having been confirmed in their appointments. The Federal Court speaking through SUFFIAN LP (as he then was) held that as the award of the Industrial Court was a mistake, it was severable, so that the High Court could quash that part which was a mistake without touching the rest.

[44] In my view, there was no error on the part of the High Court in quashing the third award.

CONCLUSION

[45] On the foregoing grounds, I hold that the learned High Court judge had correctly concluded that the employer had complied with the order for reinstatement.

The employee's appeal is dismissed with costs. The High Court's order of certiorari is hereby affirmed. Deposit to the employer on account of taxed costs.

[46] My learned brother Zulkefli JCA and my learned sister Zainun Ali JCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Brendan Navin Siva